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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES MAX DuFRIEND
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the admissions of an alleged Co-Conspirator be admitted prior to the establishment by independent evidence of a conspiracy? As provided for in *United States v. Petersen*, 611 F.2d 1313 (1979) and *United States v. Andrews*, 585 F.2d 961 (1978).

2. Is there any limits as to what might be considered "slight evidence" to connect the alleged Co-Conspirators by independent evidence? as this Court has rendered in *United States v. Nixon*, 418 U.S. 683 (1974) and *Krulewitch v. United States* 336 U.S. 440.

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I. The Court should grant Certiorari to clarify *United States v. Petersen*, 611 F.2d 1313 (1979) and *United States v. Andrews*, 585 F.2d 961 (1978), thereby establishing the "preferred order of proof" as being obligatory prior to allowing the testimony of a Co-Conspirator to establish the existence of a conspiracy.
II. The Court should grant Certiorai to determine what "slight evidence" is needed to connect alleged Co-Conspirators by to a independent evidence conspiracy as held in *United States v. Rodriquez*, 585 F.2d 1234 (1978)

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Petitioner, JAMES MAX DuFRIEND, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit.

CITATION TO OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit was issued by slip opinion on the 14th day of October, 1982, and filed of record on the 14th day of October, 1982. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Petitioner does appeal from the decision of the United States Circuit Court of Appeals for the Tenth Circuit. The mandate of the Tenth Circuit Court of Appeals was entered on the 14th day of October, 1982, and has been requested and will be forwarded upon receipt in accordance with Rule 21.

This Court's jurisdiction is invoked pursuant to Rule 17 of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner invokes the jurisdiction of this Court to review the judgment of the Tenth Circuit Court of Appeals because this Petitioner has the constitutionally protected right under the Sixth and Fourteenth Amendments to the United States Constitution for abuse of due process and equal protection. That the rights of the accused were violated in that the Government was not required to prove a conspiracy implicating the Petitioner by independent evidence before allowing the acts and hearsay declarations of Co-Conspirators as being admissable. That the Government denied Petitioner equal protection of the law as prohibited by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE

Events Leading Up To Arrest:

Petitioner complains that his convictions were entirely founded upon the uncorroborated testimony of a purported accomplice. The facts showed that the Petitioner owned the aircraft with which he operated a parachute jumping school in

Foyil, Oklahoma. That the purported accomplice, had been an irregular employee of the Petitioner who was hired at various times to assist Petitioner in his business.

That the purported accomplice borrowed the Petitioner's plane and allegedly flew to a location in Mexico determined by other alleged Co-Conspirators who were not tried in this case as Co-Defendants. That the alleged accomplice loaded the aircraft with several hundred pounds of Marijuana and re-entered the United States and crashed landed at the Okmulgee Municipal Airport, in the Eastern District of Oklahoma on the 4th day of February, 1981. The alleged accomplice fled the aircraft and several hours later called the owner of the aircraft, the Petitioner herein, and told him what had happened to the aircraft. That at the time of the phone call, Oklahoma Bureau of Narcotics Agents had arrived at the Petitioner's home after tracing the ownership of the aircraft, and spoke to the alleged accomplice during that phone call, and subsequently turned himself into the authorities and was placed under arrest.

In late March of 1981, the alleged accomplice appeared before a Federal Grand Jury sitting in the Eastern District of Oklahoma and gave testimony implicating James Max DuFriend, the Petitioner herein, in a conspiracy which extended from December 15th, 1980 through and including February 4th, 1981 and in an isolated instance to import Marijuana into the United States from Mexico and shortly thereafter, the alleged accomplice was permitted to enter a guilty plea to the misdemeanor of possession of Marijuana, for which he received a suspended sentence.

Proceeding In Trial Court:

Prior to trial, the Petitioner requested a hearing to determine the admissibility and order of proof with respect to the testimony

of the alleged accomplice at the Petitioner's forthcoming trial. The issue was again raised at trial, and the Petitioner objected to the witness being permitted to testify before a conspiracy implicating the Petitioner and the alleged accomplice was first established by independent evidence. Although the alleged accomplice was the first witness, the trial Court ruled that the conspiracy had been *independently established*, and permitted the witness to testify as to acts and declarations which would be inadmissible unless and until the conspiracy had been proven.

The Trial was conducted in the United States District Court for the Eastern District of Oklahoma on June 1st and 2nd of 1981 and a Jury found the Petitioner guilty of the charges and subsequently sentenced to concurrent three (3) year terms on both counts.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The questions were presented at the Trial Court in the manner outlined by the Statement of Case.

2. In Petitioner's first and second assignment of error on the appeal to the United States Court of Appeals for the Tenth Circuit asserting that there was error of the Trial Court in determining the conduct of the proceedings prior to trial, and re-urged by Petitioner during trial.

All Federal Questions now raised by Petitioner in this Petition for Writ of Certiorari clearly fall within the allegations of error as set out above.

REASONS FOR GRANTING THE WRIT

I

The Court should grant Certiorari to clarify the admissions of an alleged Co-Conspirator prior to the establishment by independent evidence of a conspiracy under the preferred order of proof as provided for by this court in *United States v. Petersen*, 611 F.2d 1313 (1979) and *United States v. Andrews*, 585 F.2d 961 (1978).

The Petitioner seeks review in this Court because the Petitioner's rights as an accused were violated and that he had requested a hearing to determine the admissibility and order of proof with respect to the alleged accomplice's testimony at his forthcoming Trial and renewed his objection of allowing the alleged accomplice to testify before a conspiracy implicating the Petitioner and the independent evidence first. The Petitioner seeks review of the conviction under 21 U.S.C. § 952 (a) and 963 and 21 U.S.C. § 841 (a) (1) and 846.

The Court below held that *United States vs. Petersen*, (1979); 611 F. 2nd, 1313 (Tenth Cir.), and *United States vs. Andrews*, 585 F.2d 961 (Tenth Cir. 1978) were conclusive in that the Trial Judge was aware of the "preferred order of proof" rule and was careful to avoid testimony regarding hearsay statements of Co-Conspirators until the Trial Court made the required findings outside of the Jury's presence. That the "preferred order of proof" allows the Trial Court to determine the admissibility of a Conspirator's statements following a threshold judicial decision on admissibility, which should thereby protect the Defendant from the prejudicial impact of such testimony where the Government is unable to independently establish the conspiracy. The distinction therefore in this case is to permit the Government to open its case with the testimony of a self-professed conspirator

and then rule that the conspiracy had been independently proven when no other witnesses had testified puts a burden of incalculable effect on the Petitioner's rights under the Sixth and Fourteenth Amendments of the Constitution. Petitioner further maintains that the affect of decisions in *United States vs. Nixon*, 418 U.S. 683 (1974) and *Krulewitch vs. U.S.*, 336 U.S. 440 (1948) and *U.S. vs. Stipe*, 653 F.2d 446 (1981) should be considered along with the Propositions found in *Petersen* and *Andrews*.

II

The Court should grant Certiorari to clarify what can be considered to determine what "slight evidence" is needed to connect the alleged Co-Conspirators by independent evidence to a conspiracy as held in *United States vs. Rodriquez*, 585 F.2d 1234 (1978).

This Petitioner further contends that the erroneous allowance of the "preferred order of proof" by the Trial Court immediately placed the Petitioner in jeopardy based on the uncorroborated testimony of an alleged accomplice. That the final four witnesses for the Government contributed nothing to the fact of whether or not a conspiracy existed, and thereby failed to establish by independent proof the fact of the existence of any conspiracy. That although this Court in *United States vs. James*, 590 F.2nd 575 (581-82) (Fifth Cir. 1979) recommended a procedure to be followed by Trial Judges, it also found that a substantial independent evidence rule must be applied. Petitioner further contends that such rule was not followed nor adhered to in the Trial of this case.

Equally important in this appeal is the fact that the Petitioner, was guaranteed by the rights afforded to him under the Sixth and Fourteenth Amendments to the United States

Constitution, as well as by the protection and due process clause of the Fourteenth Amendment, to have his guilt determined by a preponderance of the evidence. The Government presented only "slight evidence," circumstantial at best, to link the Petitioner to a distribution conspiracy. The evidence was not overwhelming and the Appeals Court admitted that the proof by the Government could have been stronger, but the Government relied once again on the improper admission of the alleged Co-Conspirator's testimony.

Petitioner contends that the *U.S. vs. Nixon*, *Krulewitch vs. U.S.*, and *U.S. vs. Stipe*, Supra. should similarly apply. The Government failed to establish by independent evidence at the conclusion of its case that the Petitioner was involved in a distribution conspiracy.

CONCLUSION

Petitioner prays that his Petition for a Writ of Certiorari be granted.

Respectfully Submitted,

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